IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

No. 847 78

JOSEPH M. TAUSSIG, *Petitioner,*

vs.

HONORABLE JOHN P. BARNES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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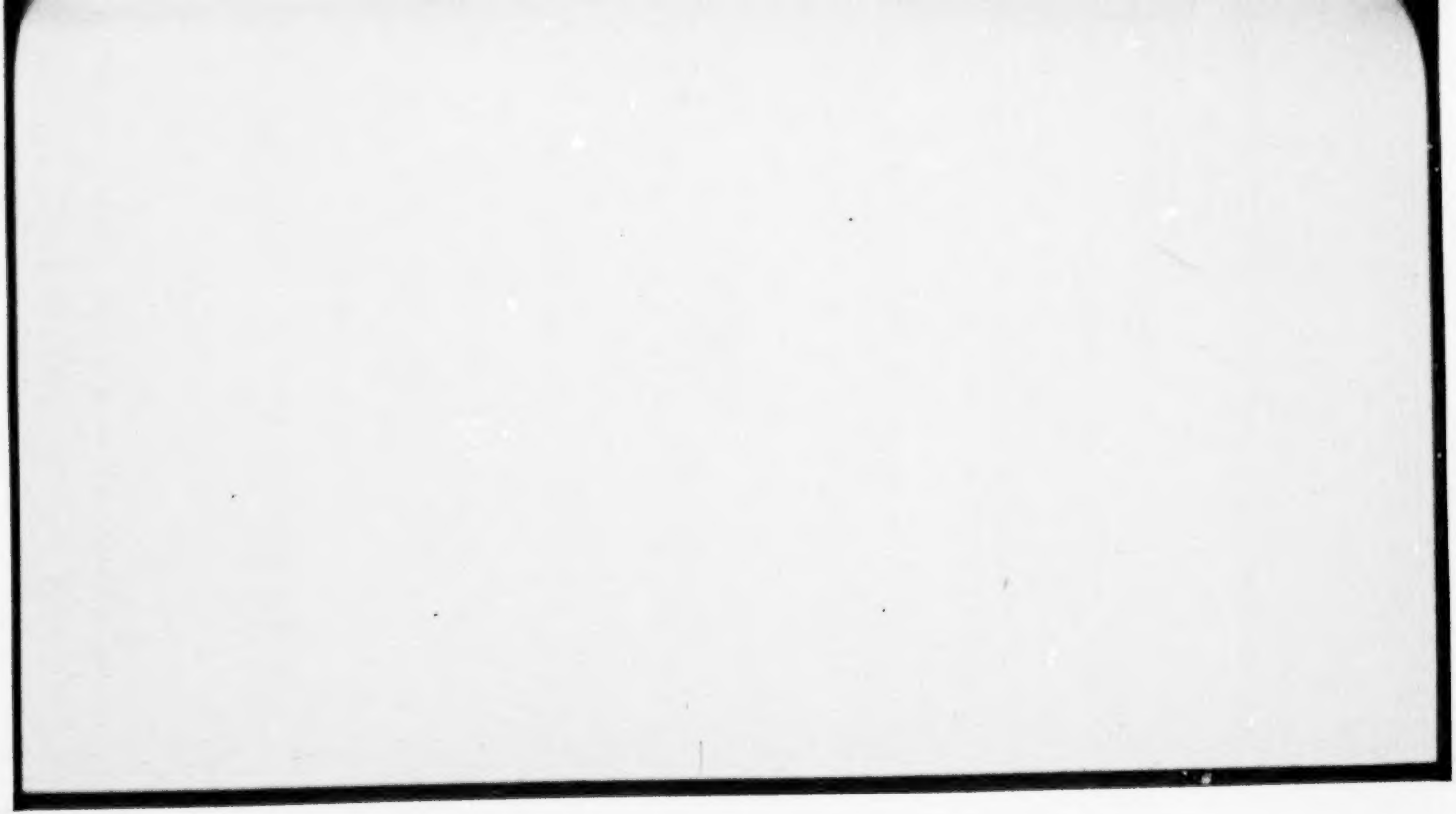

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Joseph M. Taussig, Petitioner, by his Attorneys, prays that a Writ of Certiorari issue to review the orders and judgment of the Seventh Circuit Court of Appeals which denied (Rec. 326) the Petition (Rec. 5-29, 327) of Petitioner for a Writ of *Mandamus* directing the District Court of the Northern District of Illinois, Eastern Division, to vacate and expunge all orders and decrees entered in a proceeding in which said District Court was wholly without jurisdiction, and to dismiss said proceeding.

## Opinion Below.

The *Per Curiam* opinion of the Seventh Circuit Court of Appeals denying the Petition for a Writ of *Mandamus* has not yet been reported, but is set forth in the Transcript of Record, Pages 333-337.

## Jurisdiction.

The orders and judgment of the Circuit Court of Appeals were entered on March 9th, 1948 and March 18th, 1948 (Rec. 326, 338). Jurisdiction is invoked under Section 240 of the Judicial Code of the United States as amended, Title 28 U. S. C. A. Section 347.

## Questions Presented.

The questions presented are:

1. Where the jurisdiction of a District Court rests upon a diversity of citizenship of parties, does the lack of such diversity of citizenship at the time of commencement of the suit, constitute a fundamental lack of jurisdiction?

2. Was the District Court bound to perform its judicial duty by declining ungranted jurisdiction?

3. Is the Writ of *Mandamus* available from the Circuit Court of Appeals to require the District Court to vacate and expunge orders entered in a proceeding in which the District Court was, upon proper realignment of the parties, wholly without jurisdiction, by reason of a lack of diversity of citizenship of the parties?

4. Are the decrees and orders of the District Court, entered in a proceeding in which it was without jurisdiction by reason of a lack of diversity of citizenship, wholly void and subject to review and expunging by the Circuit Court of Appeals upon petition for Writ of *Mandamus*?

5. Is the Writ of *Mandamus* available from the Circuit Court of Appeals, to review and expunge void decrees and orders of a District Court, when the time for statutory appeal has expired, or when such an appeal would have been premature?

**Statutes Involved.**

Judicial Code, Sec. 37, as amended, 28 U. S. C. A. Sec. 80.

Judicial Code, Sec. 262, as amended, 28 U. S. C. A. Sec. 377.

**Summary Statement of the Matter Involved.**

Petitioner is one of several defendants named in a complaint filed in the United States District Court of the Northern District of Illinois, Eastern Division, by his sister Mrs. Ruth Saxelby. Jurisdiction depends upon diversity of citizenship and Petitioner demonstrated to the District Court and the Seventh Circuit Court of Appeals that it is apparent on the face of the record (see tabulation infra) that this essential diversity of citizenship is wholly lacking; that realignment of indispensable parties in accordance with their true interests places citizens of Illinois and Minnesota on both sides of the case.

The District Court overruled repeated objections (Rec. 79, 82, 97, 147, 186, 190) to its jurisdiction, refused to realign the parties, heard proofs, entered a preliminary decree (Rec. 202) on June 4, 1947, referred the matter to a master-in-chancery (where it is still pending) and retained its "jurisdiction" to enter further and presumably final decrees.

On March 9, 1948, Petitioner was permitted by the Seventh Circuit Court of Appeals to file his petition for an

order on the District Court to show cause why *mandamus* should not issue. On the same day that petition was summarily denied without hearing. On March 18, 1948, motions of petitioner to amend his petition and to supplement the appendix to his petition, were denied and a *Per Curiam* opinion was filed (Rec. 333) in support of the denial of a writ of *mandamus*.

Petitioner is sued as an individual and as a co-trustee under the will of the father of both the plaintiff and petitioner. The bill charges the petitioner and his co-trustee with mismanagement and failure to account for trust assets, and charges petitioner with conversion of certain trust assets. It prays that petitioner and his co-trustee be removed and a qualified trustee be appointed to act in their stead; that title to certain parcels of real estate including one held by petitioner and his co-trustee, and another held by the American National Bank and Trust Company of Chicago, as trustee, be transferred to the new trustee for the benefit of the trusts; that the petitioner and his co-trustee give an accounting; that all other beneficiaries (except petitioner) of the trusts in question have the recovery and relief sought by the plaintiff; that the plaintiff recover her costs in the proceedings and attorney fees incurred in the restoration of assets to the trusts.

Plaintiff Saxelby is a citizen of New York. Petitioner is a citizen of Illinois. The complaint (Rec. 42-61) also names as defendants, Irving Robitshek, individually and as co-trustee, a citizen of Minnesota, Ella Robitshek of Minnesota, Rose Goodman of Wisconsin, American National Bank and Trust Company of Chicago, as trustee, and Leo Taussig who is alleged (Rec. 43) to be a citizen of Wisconsin, but who was later found by the Court (Rec. 200) to be a citizen and legal resident of Illinois at the time the complaint was filed.

The complaint further states that it is brought on behalf of all beneficiaries (except petitioner) of trusts set up by the will of plaintiff's father. Additional parties were later found to be indispensable or necessary and were added as parties defendant and plaintiff's children were added as parties plaintiff.

Leo Taussig, one of these so-called defendants, requires special notice: plaintiff alleges (Rec. 58) that the said Leo Taussig has a lien upon the trust properties to the extent of $5,000.00 annually and a specific right and claim therefor against the petitioner and his co-trustee; that the said Leo Taussig is an incompetent, requires a guardian ad litem, and is a citizen and resident of Wisconsin. The answer filed for Leo Taussig (Rec. 331) alleges lack of knowledge as to the citizenship of himself, and other parties and prays relief from the petitioner and his co-trustee in substantially the same manner and degree as prayed by the plaintiff Saxelby. The Court first found that Leo Taussig was a resident of Wisconsin (Rec. 168) at the time of filing of the complaint, but later found (Rec. 200) that he was a legal resident and citizen of Illinois at the time of filing of the complaint, but was temporarily residing in Wisconsin and that he died some months after the filing of the complaint.

A proper realignment of the indispensable and necessary parties, at the time of filing of the complaint, in accordance with their real interest as shown by the complaint (Rec. 42-61) and answers (Rec. 92-110, 147-152, 186-190, 196-8) and the Findings of Fact (Rec. 168-183, 199-201) and Conclusions of Law (Rec. 167-8, 201-2) and the Preliminary Decree (Rec. 204-9) shows the following:

| Plaintiffs | Residence | Defendants | Residence |
|---|---|---|---|
| Ruth Saxelby | New York (R. 168) | | |
| J. Robert Saxelby | New York (R. 200) | | |
| Lois Saxelby | New York (R. 200) | | |
| Joyce Saxelby | New York (R. 200) | | |
| Leo Taussig | Illinois (R. 200) | | |
| Fannie Daus | Illinois (R. 192, 200) | | |
| Leontine Robitshek | Illinois (R. 200) | | |
| Joseph M. Taussig (as beneficiary) | Illinois (R. 168) | Joseph M. Taussig | Illinois (R. 168) |
| Antoinette T. Hertzberg | Massachusetts (R. 200) | American National Bank & Trust Co. | Illinois (R. 169) |
| Ernest Taussig | California (R. 200) | | |
| Rose Goodman | Wisconsin (R. 169) | | |
| Alvin Goodman | Wisconsin (R. 200) | | |
| Alvin Goodman, Jr. | Wisconsin (R. 200) | | |
| Julia Joy Goodman | Wisconsin (R. 200) | | |
| Ella Robitshek | Minnesota (R. 169) | | |
| Irving H. Robitshek, Jr. | Minnesota (R. 200) | | |
| Irving H. Robitshek (as beneficiary) | Minnesota (R. 168) | Irving H. Robitshek | Minnesota (R. 168) |

After entry of the preliminary decree on June 4, 1947, the petitioner and certain other parties to the suit were misled and induced into signing a purported waiver (Rec. 294-7) of certain rights of appeal from said preliminary decree. This action was induced by misrepresentations by counsel for the plaintiff as to his arrangements with the plaintiff for his compensation; the actual facts appear from the affidavits of four members of the Bar and a sister of plaintiff (Rec. 315-325; Exhibits XXXI, XXXII, XXXIII, XXXIV, XXXV).

When the falsity of the representations was discovered by petitioner on September 11, 1947 (Rec. 26), the time for praying an appeal to the Circuit Court of Appeals from the preliminary decree had expired but a final decree had not been entered, the parties being then engaged in hearings in an accounting before a Master-in-Chancery and the matter was still pending there at the time of filing the petition for *mandamus*.

**Specification of Errors to be Argued.**

The Circuit Court of Appeals erred:

1. In refusing to issue a rule upon the District Court to show cause why *mandamus* should not issue.

2. In refusing to issue the Writ of *Mandamus* to the District Court.

3. In not holding that the proceedings of the District Court were void for want of jurisdiction.

4. In holding that it had no authority to issue *mandamus* to require the District Court to perform its statutory duty.

5. In validating, in effect, a fraud perpetrated on petitioner and others, in the procuring of the purported "waiver," and thus depriving petitioner and others of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

**Reasons Relied on for the Allowance of the Writ.**

**I.**

**The Seventh Circuit Court of Appeals has Rendered a Decision in Conflict with the Decisions of the other Circuit Courts of Appeals on the Same Matter.**

The Seventh Circuit Court of Appeals in this case held that *mandamus* does not lie to review and set aside orders and a preliminary decree entered in proceedings beyond the jurisdiction of the District Court. It would relegate the petitioner to a statutory method of appeal whether the time for that appeal had passed or had not yet arrived. It insists that the petitioner show the absence of any other mode of relief even though the District Court was shown on the face of the record, to be wholly without jurisdiction. It has refused to issue a rule to show cause or the writ of *mandamus* as an exercise of appellate jurisdiction and mistakenly holds that it is available only in aid of appellate jurisdiction.

The Sixth Circuit Court of Appeals reached an opposite conclusion on the same matter in 1922 in *Grable* v. *Killits, District Judge,* 282 F. 185 (Cert. den. in *Bacon Bros. Co.* v. *Grable,* 260 U. S. 735). The decision in that *mandamus* case reads in part, page 195:

> "It results from these views that petitioners are entitled to the relief asked in the mandamus proceeding, No. 3713, setting aside the orders of the court below * * *. This court had undoubted jurisdiction to issue such a *writ of mandamus* in aid of its general appellate authority. The action of the District Court being without jurisdiction to the extent stated, no question of discretion is involved. Petitioner should not be required to await the slow process of an appeal from such invalid order, whose operation meanwhile involves an encroachment upon their rights."

The Eighth Circuit Court of Appeals also held to the contrary:

> "Each Court has jurisdiction to issue the writ to a subordinate Court or judge in the exercise of and in aid of its appellate jurisdiction." (*Barber Asphalt Pav. Co.* v. *Morris,* 132 Fed. 945, 952.)

The Ninth Circuit Court of Appeals held in *In Re Dennett,* 215 Fed. 673, 679, that mandamus is the proper remedy in the Circuit Court of Appeals to review a District Court's order that was entered without jurisdiction of the cause; that this is correct procedure even though a right of review by writ of error or by appeal, also existed.

## II.

**The Seventh Circuit Court of Appeals has Decided Federal Questions in a Way Probably in Conflict with Applicable decisions of this Court.**

**A. The Court below held that the Writ of Mandamus was not available AS AN EXERCISE of Appellate Jurisdiction "When a Statutory Method of Appeal has been Prescribed or to Review an Appealable Decision of Record" (R337); that the Writ is available ONLY IN AID of Appellate Jurisdiction; that Mandamus should not issue here to restrain a District Court whose lack of jurisdiction is apparent on the fact of the record.**

This decision is in conflict with this Court's views as expressed first in *Marbury* v. *Madison,* 1 Cranch 137, 175, and as lately as May 24th, 1948, in *U. S. A., Petitioner,* v. *U. S. District Court,* No. 527, October Term, 1947 (not yet reported). In the latter case this Court stated:

> "It was early recognized that the power to issue a *mandamus* extended to cases where its issuance was either an exercise of appellate jurisdiction or in aid of appellate jurisdiction. See *Marbury* v. *Madison,* 1 Cranch 137, 175; *Ex Parte Crane,* 5 Pet. 190."

Mandamus is in the nature of appellate jurisdiction and lies as a remedy of an Appellate Court to superintend all inferior tribunals "by restraining their excesses, but also by quickening their negligence and obviating their denial of justice" (3 BL. Comm. 111; *Ex Parte Crane,* 5 Pet. 190, 192).

Even though a petitioner may have alternative rights of appeal available, the writ of *mandamus* should issue to a lower court which acted without jurisdiction (*In Re Winn,* 213 U. S. 458, 465-68).

*McClellan* v. *Carland,* 217 U. S. 268, 279, held that the Circuit Court has the right to issue *mandamus* as an exercise of appellate jurisdiction and is not restricted to action "in aid of the appellate jurisdiction," or to wait until it gets jurisdiction of the original suit by appeal from the District Court.

*Ex Parte U. S.,* 287 U. S. 241, 246, states that the power of the Circuit Court to issue *mandamus* is not limited to cases where the writ is required in aid of an appellate jurisdiction already obtained; that immediate and direct appellate jurisdiction is "lodged" in the Circuit Court of appeals.

This Court said *In Re Metropolitan Trust Co.,* 218 U. S., 312, 314, that "as the Court, in granting the motion, exceeded its power, mandamus is the appropriate remedy. *Ex Parte Bradley,* 7 Wall, 364; *In Re Winn,* 213 U. S. 458."

**B. Since the District Court was Wholly Without Jurisdiction the Circuit Court of Appeals was without Discretion, and was Required to Issue Mandamus.**

Where the District Court is without jurisdiction, the cause is *coram non judice* and every act done is a nullity (*Ex Parte Crane,* 5 Pet. 190, 192). Since the necessary

diversity of citizenship was lacking and the court was without jurisdiction, its orders were absolutely void (*Elliott* v. *Peirsol*, 1 Pet. 328, 340; *Griffith* v. *Frazier*, 12 U. S. 1, 28).

"Now, this want of jurisdiction of the inferior court * * *, is one of the specific cases in which this writ [mandamus] is the appropriate remedy." (*Ex Parte Bradley*, 7 Wall. 364-377.)

*In Virginia* v. *Rives*, 100 U. S. 313, 323-324, it is stated that *mandamus* is the correct remedy when the case is "outside the jurisdiction of the court or officers to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds."

This Court also held in *D. L. & W. R. R.* v. *Rellstab*, 276 U. S. 1, 5, that mandamus is the appropriate remedy where the District Court entered orders without jurisdiction; that the Writ should not be refused even on the ground of claimed injustice; that the lack of jurisdiction of the District Court put an end to the matter. That "The issue of a mandamus is closely enough connected with the appellate power."

The purported waiver of the rights of appeal of petitioner and other parties to the preliminary decree should not affect in any way the questions presented to the Circuit Court of Appeals or to this Court. The parties have themselves ignored the purported waiver for the nullity that it is; the proceedings before the master-in-chancery have not been completed and the rights of the parties to appeal from a final decree will be available in any case when that decree is entered. Finally it is a truism that jurisdiction cannot be conferred upon a court by the par-

ties to litigation where in fact and in law it was without jurisdiction; a void waiver cannot confer the jurisdiction or make valid a void suit.

**C. Federal Courts are Limited in Jurisdiction and Where Diversity of Citizenship is Necessary, the District Court must Determine the Facts of Citizenship, align the Parties in Accordance with their True Interest, and Show the Jurisdiction of the Court on the Record.**

All of the parties on one side of a suit must be citizens of different states from all of the parties on the other side, in order to sustain jurisdiction based on diversity of citizenship (U. S. Cons., Art. 3, Sec. 2; Jud. Code, Sec. 37, as amended, 28 U. S. C. A. Sec. 80; *Edwards* v. *Glasscock,* 91 Fed. 2nd, 625, 627.

Diversity of citizenship is a question of fact and depends upon the state of things at the time the suit was brought (*Mullen* v. *Torrance,* 9 Wheat 537, 538; *Tutun* v. *United States,* 270 U. S. 568, 578; *M. C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382, 383).

Objections based on the court's lack of jurisdiction of the parties may be raised at any stage of the proceedings and if the court is without jurisdiction its duty is to stop (*The John C. Sweeny,* 55 F. 540, 541). In such case the court has no jurisdiction but to set aside any improperly made orders (*Mail Co.* v. *Flanders,* 79 U. S. 130, 135).

Upon finding that diversity of citizenship did not exist (that Leo Taussig was a citizen of Illinois and that the complaint and his answer showed his interest to lie with the plaintiff and against the defendant) the District Court should have proceeded no further and was obliged to dismiss the suit (*Anderson* v. *Watt,* 138 U. S. 694, 702, 708).

It was the duty of the District Court to realign the parties and the Circuit Court of Appeals should have re-

quired this to be done (*Hamer* v. *New York Railways Co.*, 24 U. S. 244; *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63; *Thomas* v. *Gaskil*, 315 U. S. 442; *Town of Lancaster, Fla.* v. *Hopper*, 102 Fed. 2nd 118).

The re-alignment must be made in accordance with the real interest of the indispensable and necessary parties (*Shields* v. *Barrows*, 17 How. 130, 139; *DeGraffenried* v. *Yunt-Lee Oil Co.*, 30 Fed. 2nd 574; *Magnolia Petroleum Co.* v. *Suits*, 40 Fed. 2nd 161).

This Court should require the Seventh Circuit and the District Court to follow the decision in *Mansfield, Coldwater and Lake Michigan Railway Company* v. *Swan*, 111 U. S. 379, 383, as follows:

> "And in the most recent utterance of this Court upon the point in *Bors* v. *Preston, ante* [111 U. S. 252], it was said by Mr. Justice Harlan: 'In cases of which the Circuit [District] Courts may take cognizance only by reason of the citizenship of the parties, this Court, as its decisions indicate, declined to express any opinion of the merits, on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption in every stage of the cause is, that it is without their jurisdiction, unless the contrary appears from the record.' *The reason of the rule, and the necessity of its application, are stronger and more obvious, when, as in the present case, the failure of the jurisdiction of the Circuit [District] Court arises, not merely because the record omits the averments necessary to its existence, but because it recites facts which contradict it.*" (Italics added)

The Circuit Court of Appeals should have required the District Court, by Writ of Mandamus, to perform its statutory duty in dismissing a suit over which it had no juris-

diction (*Gilbert* v. *David,* 235 U. S. 561, 567); at the very least the Circuit Court should have required a return to the rule to show cause why *mandamus* should not issue, and should have heard the matter upon review.

## III.

**The Seventh Circuit Court of Appeals has Decided an Important Question of Federal Law Which has Not been but should be Settled by this Court.**

The Court below withheld *mandamus* despite a showing, on the face of the record, that a District Court had acted and was proceeding without jurisdiction. May the Circuit Court of Appeals refuse mandamus in its discretion on the ground that the time for statutory appeal had passed or had not arrived?

This question is of far-reaching importance to citizens. The effect of the Seventh Circuit's decision would be to pinch off a necessary remedy which has many times in the past been found essential to "Due Process of Law" for the protection of citizens, and to the exercise of the supervisory and appellate powers of intermediate courts of appeal.

Every act done by a District Court acting without jurisdiction, is a nullity. This fundamental lack of jurisdiction should be subject to attack in any court at any time (*Ex Parte Crane,* 5 Pet. 190, 192). It is the District Court, not the litigant, who is at fault in proceeding beyond its lawful bounds. Appellate courts should be available to correct the excesses of the District Courts, for no court has discretion to exceed its jurisdiction.

District Courts sometimes proceed without requisite jurisdiction. If those proceedings continue unrestrained until final decree and review by statutory appeal, great

damage may be caused to the liberty and property of litigants. In practical results a litigant who is compelled to proceed by void orders of a District Court, may be unable to meet the expenses of a statutory appeal, quite aside from bearing the burdens and injustice of an illegal and void trial or equity hearing. These instances emphasize the citizen's need for a right of direct review and for the issuance of an appropriate writ of *mandamus,* to review and determine the fundamental questions of the jurisdiction of a statutory United States District Court.

If the substantial benefits of the Writ of *Mandamus* are to be no longer available in Circuit Courts of Appeal, this Court should so declare. The right involved is fundamental.

## IV.

**The Seventh Circuit Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings, or So Far Sanctioned Such a Departure By a Lower Court, as to Call for an Exercise of this Court's Power of Supervision.**

**The District Court on the face of the Record, was Without Jurisdiction by Reason of a Lack of Diversity of Citizenship. The Circuit Court of Appeals has Refused to Issue a Rule on the District Court, on the Ground that Mandamus is not Available for the Exercise of Its Appellate Jurisdiction.**

If the Court's supervisory power does not require the Circuit Court of Appeals to issue writs of *mandamus* in cases of this kind, the consequence will be grievous. Then litigants will be compelled to wait until the entry of final decrees or judgments to obtain a review that often is slow and invariably is expensive, in order to set aside proceedings which were wholly void from the beginning. In

some cases the mode of attack may necessarily be collateral and may even involve the risk of a possible citation for contempt of court.

The denial by the Circuit Court of Appeals of the availability of *mandamus* places improper burdens upon the whole Federal judiciary system. The Circuit Court of Appeals should be compelled to hear and grant relief by *mandamus* to those who ask that a District Court perform its clear duty to proceed no further and to dismiss an action over which it is without jurisdiction because of limited statutory power (*Kloeb, District Judge* v. *Armour,* 311 U. S. 199, 204). The need here for the Court's supervision is similar to that recognized in *McCardle* v. *Cosgrove, District Judge,* 309 U. S. 634; *Ex Parte U. S.,* 287 U. S. 241.

As stated in *Ex Parte McCardle,* 7 Wall. 506, 515, "Judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

Also it is often necessary to permit the use of *mandamus* in order to avoid "piecemeal" appeals.

The Circuit Court of Appeals should be eager rather than reluctant to hear and review the requests of a citizen to be protected, by *mandamus,* from void proceedings in the District Court. The Circuit Court's power should be directed toward the prompt correction of an abuse of statutory jurisdiction by a subordinate court, rather than toward a rigorous insistence upon modes of appellate procedure to be followed by litigants who have been compelled to participate in void proceedings. The paramount appellate duty is to correct the wrong rather than the method of application for relief.

The Circuit Courts should be amenable to the rule imposed by this Court upon itself that it must "deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power, it is called to act." (*M. C. & L. M. Ry Co.* v. *Swan,* 111 U. S. 379, 382).

## CONCLUSION.

It is respectfully submitted that this Court should grant the Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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June 5, 1948.